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Supreme Court, U.S.
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No. 04-465

In The Supreme Court of the United States

MAHBOUB BENCHIMOL,

Petitioner,

vs.

MARGARET URRUTIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE LOWER COURTS DENIED PETITIONER'S FREEDOM OF INFORMATION AS GUARANTEED BY A UNITED STATES TREATY?

2. WHETHER PETITIONER'S DENIAL OF FREEDOM OF INFORMATION CONSTITUTED DENIAL OF PETITIONER'S CONSTITUTIONAL DUE PROCESS RIGHTS, REQUIRING A NEW TRIAL?

3. WERE PETITIONER'S UNRELIABLE, INACCURATE COMMENTS INAPPROPRIATELY ADMITTED TO THE RECORD, IN PART OR IN WHOLE, DUE TO MENTAL AND PHYSICAL INFIRMITIES, AND GENERAL ENNUI SUFFERED BY THE TRIAL COURT JUDGE, THE HONORABLE LEONARD L. STAFFORD, PRESIDING OVER WHAT PETITIONER BELIEVES WAS HIS LAST TRIAL BEFORE RETIREMENT?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Petitioner is seeking to invoke this Court's discretionary jurisdiction to review the following judgments: 1) decision of Florida Supreme Court dismissing appeal for lack of jurisdiction; 2) decision of Fourth District Court of Appeal of Florida affirming jury verdict and; 3) final judgment of jury verdict rendered in County Court of 17th Judicial Circuit in and for Broward County, Florida.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

This is an appeal from a jury verdict in favor of the Appellee. The Petitioner, Mahboub Benchimol, will be referred to in the position he occupied in the trial court below, as "Plaintiff." Respondent, Margaret Urrutia, will be refereed to as "Urrutia."

This is the fourth appeal the Petitioner has taken from this case. The three prior appeals have been dismissed or Petitioner has lost. The first appeal was filed in the Fourth District Court of Appeal in West Palm Beach, Florida. In that appeal, the district court ruled in favor of the Respondent and the jury trial's verdict was affirmed. (Exhibit "A").

Subsequently to that appeal decision, Petitioner filed another appeal of the same issues before the Florida

Supreme Court. That appeal was dismissed for lack of jurisdiction. (Exhibit "B"). Petitioner then filed another appeal of the same issues in the Fourth District Court of Appeal, which was dismissed. (Exhibit "C"). Petitioner has exhausted all his possible state appeals and now seeks to invoke this Court's jurisdiction herein.

STATEMENT OF FACTS

This is a case arising from a motor vehicle accident involving Plaintiff and Urrutia. Plaintiff and Urrutia were stopped at a light waiting to make a right hand turn. When Plaintiff pulled forward to turn, Urrutia took the foot off her brake. Plaintiff then stopped and Urrutia rolled into the rear of his car. (T. 252, 253). As a result of this accident, Plaintiff claimed he injured his lower back and neck. (T. 34, 36). Prior to this car accident, Plaintiff had been involved in four other car accidents. (T. 28, 54). One of the accidents occurred on October 31, 1996, six months prior to the car accident with Urrutia. (T. 29). In the 1996 accident, Plaintiff received medical treatment for neck, low back and mid-back injuries. (T. 29; D. S. 5).

At trial, Plaintiff testified that he was born in Casablanca, Morocco, and he came to live in the United States in 1992. (T. 23). Plaintiff learned conversational English in the United States and was able to understand the English language. (T. 24, 72). At trial, an interpreter was provided to Plaintiff, but he corrected her translations on several occasions. (T. 53, 55). At one point during his testimony, Plaintiff chose to testify directly without the aid of an interpreter. (R.72). Plaintiff admitted that he was able to "carry on a social conversation" in English.

(T. 127). Plaintiff was able to read English and read a portion of his deposition during the trial. (T. 53).

When Plaintiff's deposition was taken, his attorney was present. (T. 64). At the start of the deposition, Plaintiff was advised to stop if at any time he did not understand any of the questions. (T. 65). Plaintiff never stopped the deposition or expressed any difficulty understanding the questions. (T. 65, 66). At trial, Urrutia used Plaintiff's deposition to impeach him on several inconsistent statements. (T. 51, 52, 57, 58, 59, 60, 63, 65, 67, 68). For instance, at his deposition Plaintiff failed to mention that he was involved in four car accidents. (T. 52, 58, 59). At that time, no objection was lodged by Plaintiff. Later, after Plaintiff testified inconsistently about having his car repaired, Plaintiff's counsel asked for a sidebar. (T. 60). At sidebar, Plaintiff objected to the use of the deposition because he did not have an interpreter during the deposition. (T. 62). The trial court overruled the objection, but allowed Plaintiff to explain about the lack of interpreter. (T. 62).

The jury returned a verdict finding that Defendant's negligence was not the legal cause of Plaintiff's damages (R.200).

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

LACK OF JURISDICTION

The Supreme Court cannot exercise appellate jurisdiction except in cases defined and prescribed by Congress. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372 (1893). Thus, the jurisdiction of this Court to

review proceedings of the State courts is not that of a general reviewing court in error, but is limited to specific instances of denials of Federal rights, whether those pertain to constitutionality of Federal or State statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in State court and denied by the rulings and judgment of that court. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1901). The power to review state judgments is designed to restrain unconstitutional legislation, not to correct errors. *Central Land Co. v. Laidely*, 159 U.S. 103 (1895). Thus, Petitioner must show that he has been denied a right or privilege under the Constitution or treaty.

Petitioner claims that his rights under the due process clause and Freedom of Information Act were denied by the state appeal court's failure to reverse the jury's verdict. Specifically, that his rights were denied when the trial court allowed his deposition testimony to be used at trial. To establish that right, the Petitioner must show that such title or right was specially set up or claimed in the lower proceedings, and such claim cannot be matter of mere inference but requires averments so distinct and positive as to place it beyond doubt that it was intended to assert a Federal right. *Union Mut. Life Ins. Co. v. Kirchoff*, 169 U.S. 103 (1898). That is not the case here.

Simply put, there was no averment or denial of Petitioner's due process rights or rights under the freedom of information act raised below. None of the state court decisions herein involve the denial of a federal right and/or treaty. The issues decided by the state district court were issues concerning state evidentiary code and the common law. The state courts never ruled upon the freedom of information act or any federal acts or treaties when

reviewing the jury's verdict. Moreover, contrary to Petitioner's assertion, he did not raise these issues, nor were they addressed by the lower courts. Petitioner is merely attempting to get a second review of his lawsuit where he has exhausted and lost on all the available state remedies.

Petitioner's appeals were solely limited to the issues of his denial of new trial after obtaining an adverse jury verdict on his personal injury action. There were no federal issues raised, or decided, in the jury trial or any of the subsequent state court appeals. To raise a Federal question a claim must have been so referred to and mentioned as to show that it was present in the minds of parties claiming the right, or must have been in some way presented to the court. *Sweringen v. St. Louis*, 185 U.S. 38 (1902) The decision of the state district court merely affirmed the jury's verdict and the denial of Petitioner's new trial motion. Likewise, the Petitioner's subsequent appeals of that same decision, including to the Florida Supreme Court, were dismissed for lack of jurisdiction. All of those appeals were dismissed and none of them involved, or could have implicated, federal questions.

One of these decisions of the Florida Supreme Court is merely a dismissal for lack of jurisdiction. A judgment of the highest court of state which merely affirmed the order of the inferior court refusing a new trial is not a final judgment which can be reviewed in the Supreme Court of the United States. *National Life Ins. Co. v. Scheffer*, 131 U.S. 203 (1882). Accordingly, this court does not have discretionary jurisdiction and should dismiss the writ of certiorari.

ISSUES RULED UPON STATE COURT

If, however, this court were to accept jurisdiction, there was no error below and the judgment of the State District Court should be affirmed for the following reasons:

Florida statute section 90.608 provides that a party may impeach the testimony of a witness with a prior inconsistent statement. Specifically, it provides:

> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.

90.608, Fla. Stat. (1995). Furthermore, the introduction or rejection of impeaching testimony is within the sound discretion of the trial court. *Mungin v. State*, 147 So. 310, 313 (Fla. 1933). Therefore, it is clear that a party may demonstrate the bias or untruthfulness of a witness via prior inconsistent testimony. The evidence code "liberally permits the introduction of evidence to show the bias or motive of a witness." *Gibson v. State*, 661 So. 2d 288, 291 (Fla. 1995). A wide range of cross-examination is permitted to impeach the credibility of a witness. *Williams v. State,* 443 So. 2d 1053, 1054 (Fla. 1st DCA 1984). Thus, the trial court correctly allowed the Plaintiff to be impeached by his prior deposition testimony.

Furthermore, Plaintiff never raised any objection before, during or after his deposition was completed. Plaintiff was able to fully answer all the questions he was asked in English and never requested an interpreter. At the start of his deposition, Plaintiff was advised that if he

had any difficulty understanding the questions he could stop the deposition at any time. (T. 65). Plaintiff, however, never expressed any language difficulties during the deposition nor did he request that the deposition stop. (T. 65-66). Likewise, at trial, Plaintiff communicated in English and answered several questions without the use of an interpreter. (T. 72). Plaintiff was even able to read from his deposition transcript at trial. (T. 53). Additionally, when Dr. Kishner examined the Plaintiff he had no difficulty communicating with him and Plaintiff never expressed a need for an interpreter. (D. K. 25, 26). Thus, prohibiting or limiting Urrutia's right to cross-examine Plaintiff with his prior testimony would have been error.

> Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on trustworthiness of crucial prosecution testimony is improper, especially where the cross-examination is directed at a key prosecution witness. (citations omitted). The right of full cross-examination is absolute, and the denial of that right may easily constitute reversible error. *Coxwell v. State,* 361 So. 2d 148 (Fla. 1978).

Mendez v. State, 412 So. 2d 965, 966 (Fla. 2d DCA 1982).

A party must be afforded wide latitude to demonstrate bias or a possible motive of the witness to testify as he has. *Blair v. State*, 371 So. 2d 224 (Fla. 2d DCA 1979). The extent to which cross-examination should be permitted to show the bias, interest or motives of a witness rests largely within the sound discretion of the trial judge and his rulings will not be disturbed in the absence of a showing of a clear abuse of that discretion. *Pandula v. Fonseca*, 199 So. 358, 400 (Fla. 1940); *Matera v. State*, 218 So. 2d

180, 183 (Fla. 3d DCA 1969). Moreover, Urrutia laid the proper predicate to introduce the prior inconsistent statement. Before a prior inconsistent statement may be admitted in evidence, the witness making the statement must be asked if he made the statement and be given an opportunity to explain, admit or deny making the statement. *Hoctor v. Tucker,* 432 So. 2d 1352, 1354 (Fla. 5th DCA 1983). In the case at bar, the Plaintiff was asked about his prior deposition and was allowed to explain his prior inconsistent statements. (T. 130-134). Thus, there was no prejudice suffered by Plaintiff.

In addition, it is proper impeachment to use a prior statement to demonstrate that testimony at trial is inconsistent with prior sworn testimony. *See, Hicks v. Daymude*, 190 So. 2d 6, 7 (Fla. 1st DCA 1966). In *Hicks*, the district court held that it was proper impeachment in a negligence action to impeach a plaintiff, who was claiming back injuries and had denied prior similar injuries, concerning statements made by her in deposition in a prior lawsuit where she admitted prior back injury. *Id.* Likewise, here, it was proper impeachment to question Plaintiff concerning his prior inconsistent statement as it related to his prior car accidents and lower back complaints. Clearly, this testimony was relevant and proper impeachment. Plaintiff has failed to demonstrate that the trial court clearly abused its discretion in allowing the use of the prior testimony.

CONCLUSION

Wherefore Respondent respectfully requests that this Court dismiss the Petitioner's Writ of Certiorari for lack of jurisdiction and/or failure to show demonstrable error.

Respectfully submitted,

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APPENDIX A

Decision of Fourth District Court of Appeal of the State of Florida in Benchimol v. Urrutia, Case No. 4D03-263, dated March 31, 2004.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2004

MAHBOUB BENCHIMOL,

Appellant,

v.

MARGARET URRUTIA,

Appellee.

CASE NO. 4D03-263

Decision filed March 31, 2004

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Victor Tobin, Judge; L.T. Case No. 98-4746(02).

Jack Bariton of Jack Bariton, P.A., Plantation, for appellant.

Frances F. Guasch of Luis E. Ordoñez & Associates, Miami, for appellee.

PER CURIAM.

AFFIRMED.

FARMER, C.J., KLEIN and HAZOURI, JJ., concur.

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX B

Decision of Florida Supreme Court in Benchimol v. Urrutia, Case No. SC04-783, dated May 12, 2004.

SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 12, 2004

CASE NO.: SC04-783
Lower Tribunal No.: 4D03-263

MAHBOUB BENCHIMOL vs. MARGARET URRUTIA

Petitioner(s) Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
Test:

/s/ Thomas D. Hall (SEAL)
Thomas D. Hall
Clerk, Supreme Court

oh
Served:

MAHBOUB BENCHIMOL
FRANCES FERNANDEZ GUASCH
HON. HOWARD FORMAN, CLERK
HON. MARILYN BEUTTENMULLER, CLERK
HON. VICTOR TOBIN, JUDGE

APPENDIX C

Decision of Fourth District Court of Appeal of the State of Florida in Benchimol v. Urrutia, Case No. 4D04-2092, dated June 25, 2004.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

June 25, 2004

CASE NO.: 4D04-2092
L.T. No.: 93-4746 02

MAHBOUB BENCHIMOL v. MARGARET URRUTIA

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED *sua sponte*, the above-styled appeal is hereby dismissed for nonpayment of the $250.00 filing fee.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Mahboub Benchimol Frances F. Guasch

mg

/s/ Marilyn Beuttenmuller (SEAL)
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal